Supreme Court, U.S.
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No. 03-653

In The Supreme Court of the United States

EXTRUSIONS DIVISION, INC.,

Petitioner,

v.

SILVER CREEK DRAIN DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK S. ALLARD*
MATTHEW ZIMMERMAN
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Bridgewater Place/
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

THE PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

This matter has been consolidated with *Extrusions Division, Inc. v. City of Grand Rapids and Kent County Drain Commissioner*. The Respondents are governmental agencies, and, thus, no Supreme Court Rule 29.6 Disclosure is required.

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INTRODUCTION

Petitioner makes a basic assumption throughout its entire Petition for a Writ of Certiorari that is not accurate. The State of Michigan has never adopted an "exclusion" statute for determining "just compensation" when the condemned property is environmentally contaminated. This error by Petitioner is compounded by its argument that the Michigan Supreme Court made its determination based only on a Constitutional review, without doing any statutory analysis. The Michigan Supreme Court did, however, complete a detailed statutory interpretation process in this matter, and determined that the Michigan Legislature had not, in fact, adopted an "exclusion" approach to valuation in condemnation proceedings. This is a fatal flaw in Petitioner's analysis.

It is uniformly accepted that a condemnation proceeding is an *in rem* proceeding. Thus, the primary focus of all constitutional interpretations dealing with condemnation proceedings is to determine the value of the *rem*. Petitioner's entire analysis hinges upon condemnation proceedings being converted to *in personam* proceedings.

Finally, Petitioner simply overstates historic Constitutional analysis of this Court in assessing proceedings pursuant to the Fifth Amendment to the U.S. Constitution.

COUNTERSTATEMENT OF THE CASE

In its Statement of the Case, Petitioner assumes that the Amendments to the Michigan Uniform Condemnation

Proceedings Act ("U.C.P.A." throughout) that were enacted by the Michigan Legislature in 1993 create an "exclusion" statute. *See*, Petition for a Writ of Certiorari, at p. 3. This analysis is flawed, however, as it is exactly opposite of what the Michigan Supreme Court held in its Opinion. App. 1-21. This error is compounded in Petitioner's Statement of the Case, where Petitioner makes the following statement:

> In reaching its holding, the Michigan Supreme Court reasoned that it did not even need to engage in the exercise of statutory interpretation. Rather, the Michigan Supreme Court held that the Michigan Statute could not constitutionally require the exclusion of the effect of the contamination because to do so would remove a factor relevant to "market value."

See, Petition for a Writ of Certiorari, at pp. 13-14. This analysis of the Michigan Supreme Court's Opinion is erroneous.

The Michigan Supreme Court made it very clear that it must interpret the language of the statute in the U.C.P.A. *See*, Opinion, App. 6-7. The Michigan Supreme Court then spent a majority of its Opinion analyzing the U.C.P.A. in determining what the Michigan Legislature meant in the U.C.P.A. when the statute was adopted and amended. *See*, Opinion, App. 7-14.

The Michigan Supreme Court held that, since the legislature utilized the term "just compensation" when it unified all of the condemnation procedures in the U.C.P.A., the legislature must have intended those words to have the same meaning as the constitutional use of those words. *See*, Opinion, App. 6-7. The Michigan Supreme Court then

noted that the Fifth Amendment of the United States Constitution and "[e]very Michigan constitution has had a similar clause requiring just compensation in these circumstances." *See*, Opinion, App. 6. The Michigan Supreme Court then performed a delicate and intricate statutory interpretation analysis as to the meaning of "just compensation" in the U.C.P.A. *See*, Opinion, App. 7-14.

The Michigan Supreme Court first noted that the term "just compensation" in the U.C.P.A. must be given the same meaning as it is in the Constitution. *See*, Opinion, App. 7 (citation omitted). The Michigan Supreme Court then analyzed what "just compensation" meant pursuant to the Constitution.

The Michigan Supreme Court held that "just compensation" is a "technical legal term or a phrase of art in the law[.]" *See*, Opinion, App. 7, *quoting Michigan Coalition of State Employee Unions v. Civil Service Commission*, 465 Mich. 212, 222-223, 634 N.W.2d 692 (2001). Since the term "just compensation" is a "technical legal term," "the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended." *Id.*, at Opinion, App. 7-8 (footnote omitted). Thus, the Michigan Supreme Court noted that, since the legislature used this "term of art" when it adopted and amended the U.C.P.A., the legislature meant it to be interpreted as that term had been interpreted when the constitutional language was adopted in 1963. *Id.*

The Michigan Supreme Court then completed a thorough analysis of state and federal constitutional law as it relates to the matters that are to be taken into consideration when determining "just compensation." *See*,

App. 9-11. The Michigan Supreme Court then determined that the term "just compensation"

> was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value. It is this meaning that the Constitutional drafters and ratifiers are held to have understood when they were adopting the Michigan Constitution of 1963, and a similar understanding is attributed to the legislators, who also used the phrase 'just compensation' when they enacted the UCPA in 1980.

See, Opinion, App. 11-12 (footnote omitted).

The Michigan Supreme Court then interpreted the amendments to the U.C.P.A. that were enacted in 1993 by the Michigan Legislature, and determined that those provisions, as written, could not be interpreted as suggested by Petitioner:

> That the Legislators who amended the UCPA in 1993 provided the procedures and means for securing remediation costs and dovetailed those with the just-compensation determination indicates no intent to abrogate the meaning of 'just compensation' established in our jurisprudence. Indeed, to attribute such an intent, i.e., the intent to diminish a constitutional standard by statute, is to place the legislators in the posture of acting unconstitutionally. This we avoid unless no other construction is possible and, as such, an alternate construction is possible, we adopt it.

See, Opinion, App. 12 (footnotes omitted).

Thus, the Michigan Supreme Court did, in fact, conduct an extensive statutory construction analysis in its

Opinion. For Petitioner to claim, as it has in its Petition for a Writ of Certiorari, that the "Michigan Supreme Court reasoned that it did not even need to engage in the exercise of statutory interpretation[,]" is, therefore, erroneous. *See*, Petition for a Writ of Certiorari, at 13.

ARGUMENT

I. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW BECAUSE THE MICHIGAN SUPREME COURT HAS DETERMINED, BY STATUTORY CONSTRUCTION, THAT THE STATUTE RELIED UPON BY PETITIONER IS NOT, IN FACT, AN "EXCLUSION" STATUTE.

As noted in the Counterstatement of the Case, above, Petitioner's Statement of the Case incorrectly claims that the Michigan Supreme Court did not perform a statutory analysis of the 1993 amendment to the U.C.P.A. Petitioner's entire theory of the case is that the legislature adopted an "exclusion" statute by adopting the amendments to the U.C.P.A. in 1993, and that the Constitutional analysis by the Michigan Supreme Court runs contrary to the decisions of two other State Supreme Courts (Iowa and New Jersey), and thus creates a conflict worthy of review by this Court. *See*, Petition for a Writ of Certiorari, at 15-21.

As noted in the Counterstatement of the Case, however, Petitioner's analysis of the Michigan Supreme Court's decision is flawed. The Michigan Supreme Court merely interpreted the legislative intent when the Michigan Legislature amended the U.C.P.A. in 1993. It held, unequivocally, that when the Legislature utilized the term

"just compensation" in the amendments in adopting the U.C.P.A. in 1980, and amending it in 1993, it utilized a legal term of art, and that term of art must be given the same meaning as it was in 1963 when Michigan adopted its current Constitution. *See*, Opinion, App. 6-12. The crux of the analysis by the Michigan Supreme Court is that the legislature, in Michigan, used a legal term of art when it adopted the U.C.P.A., and amended it in 1993. By utilizing the term "just compensation," the legislature utilized a term that has specific, long analyzed meanings that must be interpreted consistently with those meanings. *See*, Opinion, App. 7-8, *citing*, *Michigan Coalition of State Employee Unions v. Civil Service Commission*, 465 Mich. 212, 222-223, 634 N.W.2d 692 (2001). The Michigan Supreme Court, in determining legislative intent, has consistently held that when the legislature uses a legal term of art that is contained in the Constitution, those meanings of these words will be the same as the Constitutional interpretation of those words, "unless it is clear . . . that some other meaning was intended." *Id.*, *quoting* *Michigan Coalition of State Employee Unions*, at 223.

The Michigan Supreme Court did not simply complete a constitutional analysis of whether an "exclusion" statute was or was not viable. The Michigan Supreme Court held that the Michigan Legislature, when it amended the U.C.P.A. in 1993, intended the words "just compensation" to have the same meaning as those terms did when the 1963 Michigan Constitution was adopted. *See*, Opinion, App. 8-13. The Michigan Supreme Court then determined the meaning of "just compensation" within those parameters, reviewing both state and federal constitutional law. *See*, Opinion, App. 8-12.

It is within these parameters that the Michigan Supreme Court held that there is no indication of "intent to abrogate the meaning of 'just compensation' established in our jurisprudence" when the legislature amended the U.C.P.A. in 1993. *See*, Opinion, App. 12. The Michigan Supreme Court interpreted the statutory language in such a fashion that it determined the legislative intent, and held, unequivocally, that the 1963 meaning of "just compensation" was the meaning intended by the legislature when it adopted the 1993 U.C.P.A. amendments. *Id.*

Thus, the petitioner's entire basis for this petition is erroneous. The Michigan Supreme Court did, in fact, conduct a detailed statutory interpretation. It held, unequivocally, that Michigan had not adopted an "exclusion" statute. This finding is consistent with U.S. Constitutional and Michigan Constitutional analysis. Thus, the Petition for a Writ of Certiorari should be denied.

II. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW AS THE WELL-ESTABLISHED PRINCIPLE OF "JUST COMPENSATION" PURSUANT TO THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION FOCUSES ON "MARKET VALUE" IN CIRCUMSTANCES LIKE THIS.

It is a well-established principle that any evidence that affects the market value of a property is admissible for purposes of determining just compensation. *See e.g.*, *Searl v. Lake Co. School Dist. No. 2*, 133 U.S. 553, 564, 10 S. Ct. 374, 33 L. Ed. 740 (1890) (holding that a determination of just compensation must include "every . . . element entering into its cash or market value, as tested by its capacity for any and all uses. . . . "); *Seaboard*

A.L.R. Co. v. United States, 261 U.S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664 (1923) (holding that "[t]he requirement that 'just compensation' shall be paid is comprehensive and includes all elements. . . . "); *United States v. Twin City Power Co.*, 350 U.S. 222, 250-251, 76 S. Ct. 259, 100 L. Ed. 240 (1956) (holding that "[j]ust compensation includes all elements of value that inhere in the property. . . . ").

Common sense dictates that a potential purchaser will pay less for a contaminated property than for a similar property that is free of contamination. No reasonable buyer would pay full price for a contaminated site, and accept the potential liability arising from the site, if a clean site is available at the same cost. Therefore, evidence of contamination clearly affects the market value of condemned property, and must be considered in determining the just compensation for a condemned piece of property.

In the present case, both parties acknowledged that the environmental condition of the property had an impact on its fair market value. In fact, both Petitioner and Respondents introduced expert testimony regarding the impact of environmental contamination on a potential purchaser in the marketplace. On that basis, the Circuit Court found that the environmental condition of the property impacted its value. Thereafter, the Michigan Supreme Court ruled that contamination was relevant to the fair market value of the property in question and found that the Circuit Court properly considered contamination as one factor in determining just compensation. *See*, Opinion, App. 12-14. This is entirely consistent with the precedent of this Court, as established by *Searl v. Lake Co. School Dist. No. 2*, 133 U.S. 553, 564, 10 S. Ct. 374, 33

L. Ed. 740 (1890), *Seaboard A.L.R. Co. v. United States*, 261 U.S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664 (1923) and *United States v. Twin City Power Co.*, 350 U.S. 222, 250-251, 76 S. Ct. 259, 100 L. Ed. 240 (1956).

Despite the foregoing authority, Extrusions argues that the Michigan Supreme Court's decision is in direct conflict with this Court's precedent, citing a number of cases in support of the proposition that courts may depart from a strict adherence to fair market value criteria in determining just compensation. *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945); *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979) and *United States v. Cors*, 337 U.S. 325, 69 S. Ct. 1086, 93 L. Ed. 2d 1392 (1999). Petitioner claims that "market value" is simply a "Working Rule" for just compensation analysis. Petition for a Writ of Certiorari, at pp. 22-26. Each of these decisions, however, involved unique circumstances where no determination of fair market value was feasible or appropriate.

In *Commodities Trading Corp.*, Commodities brought suit against the U.S. government seeking to recover just compensation for 760,000 pounds of pepper that had been requisitioned by the War Department during World War II. This Court found that no fair market value could be determined at that time because the price of pepper was governed by the Emergency Price Control Act. On that basis, this Court departed from the fair market value,

using the ceiling prices set under the Emergency Price Control Act to set just compensation.

Similarly, in *United States v. Cors*, 337 U.S. 325 (1949), the owner of a tugboat sought just compensation for one of many tugboats that was requisitioned by the government during World War II. The owner argued that just compensation should be based on the increased demand for tugboats created by the government. The Court stated that it was not fair that the government be required to pay the enhanced price which its demand alone had created. That enhancement reflected elements of value that was created by the urgency of its need for the property. It did not reflect what a willing buyer would pay in cash to a willing seller in a fair market. It represented what could be exacted from the government whose demands in the emergency created a sellers' market.

In *Miller*, the owner of condemned property sought to recover just compensation for property based on increased market value that was due to the government's authorization of the railroad project for which the property was ultimately condemned. In that case, the United States Supreme Court held that a property owner was not entitled to just compensation from the government for market value increases that were attributable to the government's authorization of a project in the vicinity of the condemned property.

In *Almota Farmers Elevator*,[1] a property owner sought to recover the value of improvements at a condemned

[1] Extrusions also quotes *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 483 (1973), in support of the

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property based on the value of those improvements over their useful life. The Court held that just compensation for improvements requires a consideration of value of continued use of improvements, because that is how the market would have valued such improvements. Therefore, if anything, this case demonstrates the Court's reluctance to depart from the use of fair market value in determining just compensation.

In *United States v. General Motors Corp.*, General Motors sought to recover just compensation for condemnation of a leasehold interest in a plant. There, the Court ruled that, although compensation was normally limited to fair market value in cases where property was taken in fee simple, and although the taking here was temporary, its effect was to destroy the tenant's leasehold. Thus, General Motors was entitled to compensation for such consequential costs as moving out of the property and preparing the space for occupancy by the government. This case focuses on the aspect of a temporary taking that is, in essence, a total taking of the tenant's interest in the property, and how to compensate for those incidentals.

Finally, in *564.54 Acres of Land*, the owner of nonprofit summer camps argued that just compensation required payment of replacement costs rather than the fair market value of the property because there was not an active market for summer camp properties. This Court

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proposition that fair market value is not a "universal formula" for determining just compensation; however, Extrusions fails to note that the quoted phrase is actually from the dissenting opinion in that case. Consistent with the general rule, the majority held that just compensation is determined by "fair market value." *Id.* at 474.

noted that departure from the use of the fair market value principle is allowable only in instances in which market value is too difficult to ascertain, such as the condemnation of public roads or sewers. In that case, however, this Court found that a fair market value could be determined for summer camps that had been condemned, despite the fact that there was an extremely inactive market for such properties.

Thus, even under the cases cited by Extrusions, this Court has allowed a departure from a strict adherence to fair market value criteria in determining just compensation only in light of unique circumstances where no determination of fair market value was feasible or appropriate. That is clearly not the situation here. As previously noted, both parties offered expert testimony on the determination of fair market value. Furthermore, none of the cases cited above suggest that it is in any way "unconstitutional" for a trial court to determine just compensation where the fair market value is readily ascertainable, as here. Thus, it is the theory advanced by Extrusions, and not the decision of the Michigan Supreme Court, that is in direct conflict with the precedent of this Court.

III. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW AS THE ISSUES RAISED ARE STATE SPECIFIC, AND A "CONFLICT" BETWEEN SUPREME COURTS ON THIS ISSUE HAS NOT, IN FACT, ARISEN AS A RESULT OF THE ANALYSIS OF THE MICHIGAN SUPREME COURT IN THIS MATTER.

A. Under Michigan Law, The Exclusion Of Evidence Of Environmental Contamination In Condemnation Proceedings Would Result In The Unjust Enrichment Of Property Owners, And Would Create A Disincentive To Brownfield Redevelopment.

It is a well-established and long-standing principle of Michigan condemnation law that "the public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public expense." *Department of Transportation v. Van Elslander*, 460 Mich. 127, 129, 594 N.W.2d 841; *see also*, *State Hwy. Commissioner v. Eilender*, 362 Mich. 697 699, 108 N.W.2d 755. This principle is consistent with the Supreme Court's holding that "a private party 'is entitled to be put **in as good a position** pecuniarily as if his property had not been taken. **He must be made whole but is not entitled to more.**'" *See Brown v. Legal Found.*, 538 U.S. 216, 123 S. Ct. 1406, 1419, 155 L. Ed. 2d 376 (2003) quoting *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 54 S. Ct. 704 (1934) (emphasis added). To prevent the unjust enrichment of the property owner in condemnation proceedings, the Courts have allowed the condemning authority to present any relevant evidence that tends to affect the market price of the property, thereby allowing the condemning authority to show any defects, damages or other factors which would result in a reduced market price.

Petitioner argues that evidence of contamination must be excluded during condemnation proceedings to protect a property owner's right to just compensation. In support of this argument, Petitioner cites *Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997), in which the Supreme Court of Iowa found that evidence of cleanup costs were inadmissible during condemnation proceedings because admission of such evidence would not allow the owner of contaminated property to raise defenses in the condemnation proceedings that would be available in a cost recovery action. This ruling apparently fails to recognize the distinction between condemnation proceedings and cost recovery actions. While cost-recovery actions are concerned with fault, the purpose of condemnation proceedings is to determine the amount of just compensation due to the owner of condemned property. As noted in § II., above, just compensation is determined by the market value of the property. Because any defenses that a property owner might have in a cost recovery action do not affect the market value of the property, any such defenses have no bearing on just compensation, and therefore do not provide a basis for the exclusion of evidence of contamination in condemnation proceedings.

Furthermore, the exclusion of evidence of contamination is inconsistent with this Court's ruling in *Brown v. Legal Found.*, *supra*, that a property owner is not entitled to more than just compensation. If contaminated property is valued as though it were clean during the valuation trial the property owner clearly receives a judgment in excess of just compensation. The property owner is unjustly enriched in an amount equal to the difference between the value of the contaminated property and the

value of it as clean. Extrusions previously argued that this apparent injustice can be remedied if the condemning authority is made whole in a subsequent cost recovery action. The right to bring a cost recovery action, however, does not balance the unjust enrichment to a property owner. Moreover, this additional step does not ensure that the actual payments ultimately received by the property owner equal fair market just compensation. On the contrary, at the close of condemnation proceedings the property owner receives compensation in excess of the fair market value.

While it is possible that the condemning authority may recover the excess amount through a subsequent cost recovery action, it may ultimately be left "holding the bag" for environmental damages in the event that the current property owner did not cause the contamination. If the property owner did not cause the contamination, the condemning authority would have no basis under current Michigan law for recovery of response costs in a subsequent cost recovery action against the property owner.[2] Thus, if evidence of contamination is excluded during condemnation proceedings, the property owner would receive a windfall because contaminated property could be purchased at a reduced rate while the condemning authority would be required to compensate the property owner for the taking of clean property.

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[2] Pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA) at MCL 324.20101 *et seq.*, a purchaser of contaminated property may file a baseline environmental assessment (BEA) within 45 days of the date of purchase documenting the levels of contamination present, thereby relieving that purchaser of liability for that contamination.

Based on the foregoing, the Michigan Supreme Court appropriately held that just compensation must be determined during condemnation proceedings since, under Michigan law, there is no guarantee that subsequent actions will adequately ensure that fair market value has been awarded. To hold otherwise not only unjustly enriches owners of contaminated property, but also penalizes a condemning authority, creating a serious disincentive to brownfield redevelopment in direct contravention of established public policy.

B. Michigan's Uniform Condemnation Procedures Act Does Not Allow For Double Recovery Of Environmental Response Costs.

Petitioner argues that the admission of evidence of contamination during condemnation proceedings deprives a property owner of just compensation because such a procedure would allow a condemning authority to obtain double recovery against the owner for environmental response costs. *See*, Petition for a Writ of Certiorari, at 17, *citing*, *Hous. Auth. v. Suydam Investors, L.L.C.*, 826 A.2d 673, 686 (New Jersey 2003). Petitioner argues that a condemning authority could obtain contaminated property at reduced value and "later sue[ ] the owner in a cost-recovery action" to recover related environmental response costs. *Id.*

Despite the fact that Michigan condemnation law does not violate the constitutional principle of just compensation, (*see*, § II., above) Petitioner seeks certiorari on the grounds that two other state supreme courts have reached a different conclusion with respect to the admissibility of evidence of contamination, *citing, Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997) and *Hous. Auth. v. Suydam Investors, L.L.C.*, 826 A.2d 673

(New Jersey 2003). In essence, Petitioner asks this Court to review Michigan's condemnation procedures from the U.C.P.A. in light of opinions interpreting condemnation procedures in place in New Jersey and Iowa. Yet, because each of these states has its own unique condemnation procedure, whether evidence of contamination is admissible in New Jersey or Iowa is irrelevant here.

A simple review of the specific procedure allowed by the Michigan U.C.P.A. establishes the protections in the statute to prevent double recovery. Section 5 of the Uniform Condemnation Procedures Act (U.C.P.A.) states as follows:

> The good faith offer shall state whether the agency **reserves or waives** its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver.

MCLA 213.55(1); (Emphasis added) ("§ 5 of the U.C.P.A." throughout).

It is undisputed that § 5 of the U.C.P.A. requires the condemning authority to either reserve or waive its right to bring a subsequent cost recovery action. The very inclusion of this requirement suggests that the waiver or reservation of rights would have some effect on the condemnation proceeding itself. The clear intent of § 5 of the U.C.P.A., when read as a whole, is to prevent a condemning authority from pursuing double recovery for environmental damages through both condemnation proceedings and subsequent cost recovery actions. Therefore, it stands

to reason that where a condemning authority has reserved its right to bring a subsequent cost recovery action, it is precluded from seeking double recovery by introducing evidence of contamination in condemnation proceedings under § 5 of the U.C.P.A. However, where a condemning authority has waived its right to bring a subsequent cost recovery action, it is allowed to introduce evidence of contamination to the extent that the contamination affects the fair market value of the property. This interpretation in no way conflicts with the plain language of § 5 of the U.C.P.A., and gives meaning to the waiver provision contained therein. To hold otherwise deprives the requirement of any real effect. The condemning authority would have no incentive to ever waive its right to bring a subsequent cost recovery action since such a waiver would amount to a complete release of any right to protect itself from environmental damages.

In summary, the U.C.P.A. requires a condemning authority to **either** reserve its right to bring a cost recovery action, in which case the condemning authority may not introduce evidence of environmental contamination during condemnation proceedings, **or**, alternatively, waive its right to bring a cost recovery action, which entitles the condemning authority to introduce evidence of contamination in determining fair market value. *See* MCLA 213.55(1). As a result, there is no potential for double recovery by the condemning authority.[3] Thus, the U.C.P.A.

[3] Petitioner argues that there is a potential for double recovery in a cost recovery action, *citing*, *Detroit v. A.W. Miller, Inc.*, 842 F. Supp. 957 (E.D. Mich. 1994); however, Petitioner fails to note that the condemnation proceedings at issue in that case were initiated in 1987, long before

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protects property owners' right to just compensation while preventing the unjust enrichment of property owners at the expense of the public.

In spite of this, Petitioner argues that potential double recovery against the owner by the condemning authority violates a property owners right to just compensation, *citing, Hous. Auth. v. Suydam Investors, L.L.C.*, 826 A.2d 673 (New Jersey 2003). In *Suydam*, the Supreme Court of New Jersey held that "[w]hen property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a 'double-take.'" *Id.* at 686. However, the New Jersey condemnation procedures at issue were dramatically different than those set forth in the Michigan U.C.P.A. In reviewing the New Jersey condemnation procedures, the *Suydam* court described the condemnation process as follows:

> In different decisions, our Appellate Division has sanctioned both approaches for valuing contaminated property in condemnation. In *New Jersey Transit Corp. v. Cat in the Hat*, 353 N.J. Super. 364, 376-78, 803 A.2d 114 (2002), aff'd, 177 N.J. 29, 826, A.2d 690, 2003 N.J. LEXIS 689, N.J. (2003), the Appellate Division approved the following procedure: the condemnor appraises the property as if remediated; deposits that amount in a trust fund in court and reserves the right to bring a separate action to recover remediation

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the 1993 U.C.P.A. Amendments were enacted. As a result, the *Detroit* decision has no bearing on the present case.

> costs. The second method was approved in this case: the condemnor considers environmental contamination in calculating the fair market value of the property, reduces the property value accordingly, deposits that money in court and reserves the right to file a separate action to recover any remediation costs. *Housing Auth., supra*, 355 N.J. Super. at 540. It falls to us to choose the best of those methods.

Id. at 685.

As set forth above, New Jersey condemnation procedures clearly did not track § 5 of the U.C.P.A., which require a condemning authority to **either** reserve its right to bring a cost recovery action **or** waive its right to bring a cost recovery action, entitling it to introduce evidence of contamination in determining fair market value. On the contrary, the New Jersey condemnation procedures that were found to be in violation of the constitutional principle of just compensation allowed the condemning authority to **both** "consider environmental contamination in calculating the fair market value of the property" **and** "reserve the right to file a separate action to recover any remediation costs." *Id.* Thus, unlike the U.C.P.A., the condemnation procedures at issue in *Suydam* did not preclude double recovery of environmental response costs.

IV. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW AS PETITIONER'S ARGUMENT ATTEMPTS TO CONVERT A CONDEMNATION PROCEEDING FROM AN *IN REM* PROCEEDING TO AN *IN PERSONAM* PROCEEDING.

The United States Supreme Court has long recognized that condemnation proceedings are *in rem* proceedings.

A.W. Ducket & Co., Inc. v. United States, 266 U.S. 149, 45 S. Ct. 38, 69 L. Ed. 216 (1924); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946); *United States v. Carmack*, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209 (1946).

In rem proceedings are against the property, and the concept of individual liability is foreign to the process. *Id.* *In rem* proceedings in condemnation matters are instituted to determine the value of the property and to transfer ownership of the property to a state agency. The parties are the state and the current owner of the land. The identity of who devalued the property is, in fact, irrelevant to this *in rem* proceeding.

An action to recover environmental remediation costs is an *in personam* proceeding, instituted to assign liability and to allocate responsibility among the defendants for clean-up costs. These proceedings are brought pursuant to the relevant environmental statutes, being either part 201 of the Michigan National Resources and Environmental Protection Act, MCL §§ 324-20202, *et seq.* or the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.* (CERCLA). The value of the property is not at issue in NREPA or CERCLA matters and the U.C.P.A. does not govern those proceedings.

The issue, as conceded by Petitioner in its Petition for a Writ of Certiorari, at pp. 16-19, in a cost recovery action, is identifying the specific individual or entity that is responsible for devaluation of the property. Additionally, the damages may far exceed the value of the property. This is, in the classic sense, an *in personam* proceeding. In a condemnation proceeding, however, the issue is not to

assign liability to individuals or entities, but to simply value the property.

Petitioner's analysis, therefore, is an attempt to reverse the long standing precedent of this Court, and to argue that proceedings of condemnation actions be converted to *in personam* proceedings. Petitioners argue, therefore, that condemnation proceedings should not look at the value of the property, irrespective of personal liability, but to personal liability in valuing the property in an *in rem* proceeding. This runs contrary to the long standing precedent of this Court.

CONCLUSION AND RELIEF

For all the foregoing reasons, Respondent requests that the Petition be denied.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

MARK S. ALLARD (P-38164)
MATTHEW D. ZIMMERMAN (P-33296)
Counsel for Respondents
Business Address & Telephone:
Bridgewater Place/P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

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